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Nos. 906 and 907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MATSON NAVIGATION COMPANY, *Petitioner*

v.

PACIFIC FAR EAST LINE, INC. ET AL, *Respondents*

FEDERAL MARITIME BOARD ET AL, *Petitioners*

v.

PACIFIC FAR EAST LINE, INC. ET AL, *Respondents*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PACIFIC FAR EAST LINE, INC. IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 674-679),[1]

[1] "R" refers to the certified copy of the record in the United States Court of Appeals for the District of Columbia Circuit, which has been filed with the Clerk of this Court.

which is not yet reported, is set forth in the petitions (Bd. 27-32; Mat. 15-19).[2]

JURISDICTION

The judgment of the Court of Appeals (Bd. 33; Mat. 20) was entered on February 4, 1960. The petitions were filed on May 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the Board's denial of an application under Section 805(a) of the Merchant Marine Act, 1936 by Pacific Far East Line, Inc. (hereinafter referred to as "PFEL"), a subsidized carrier in the foreign trade, to operate an unsubsidized Pacific Coast—Hawaii service in the domestic trade is subject to judicial review.

2. Whether the Court of Appeals correctly held that the Board misconstrued the standard of "unfair competition" contained in Section 805(a) in denying on that ground PFEL's application to enter the Pacific Coast—Hawaii trade in competition with an existing

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[2] "Bd. —" refers to the petition for certiorari filed by the Federal Maritime Board and Maritime Administration, hereinafter collectively referred to as the "Board"; "Mat. —" refers to the petition for certiorari filed by the Matson Navigation Company, hereinafter referred to as "Matson"; and "U.S. —" refers to the brief filed by the United States in opposition to the petitions.

The printed record in the court below consisted of the Joint Appendix in Case No. 14,007, *Pacific Far East Line, Inc.* v. *United States*, 255 F. 2d 182 (C.A.D.C.), *cert. denied*, 358 U.S. 866 (1958), hereinafter referred to as "J.A. —," and a new Joint Appendix in the instant appeals case Nos. 15,085 and 15,086 in the court below, hereinafter referred to as "J.A.S. —."

domestic service in that trade by Matson, also a subsidized carrier in the foreign trade.

3. Whether the Court of Appeals correctly held that the Board's finding that PFEL's entry into the domestic trade would be "prejudicial to the objects and policy" of the Merchant Marine Act, 1936 (a) lacked any basis for enabling the Court of Appeals to determine the validity of the finding and (b) failed to take into consideration Matson's monopoly of the California-Hawaii trade.[3]

STATUTES INVOLVED

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. § 1223(a), and the relevant provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT OF THE CASE

The case is adequately stated in the Brief for the United States in Opposition to the petitions (U.S. 3-6).

ARGUMENT

Petitioners' sweeping assertions that the decision of the court below opens the door for the invasion of the domestic coastwise and intercoastal water trades by

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[3] Matson, but not the Board, adds an additional question (Mat. 3), the purpose of which is to seek review of the order of the district court (J.A.S. 25) granting the motion of the United States for intervention under Rule 24(b) of the Federal Rules of Civil Procedure. Since Matson did not appeal from the district court's order permitting intervention of the United States, it has no standing to raise this question before this Court. In any event, the discretion exercised by the district court should not be upset. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 521-526 (1947).

subsidized carriers, that this decision adversely affects national defense policy in the maintenance of a deep water fleet serving the domestic trades and that this decision "throws open to judicial review" a determination "which is committed to agency discretion" (Bd. 9, 12-13)[4] have no basis in the record. This litigation, simply stated, involves only the attempt of an administrative agency (the Board) to avoid judicial review of an agency determination plainly subject to judicial review, to support an unjustifiable and plain misconstruction of a statute administered by the agency and to avoid giving any explanation of an ultimate determination required to be made by the agency on the basis of a hearing.

The precise perspective of this litigation is further beclouded by petitioners' failure to state certain material facts. Petitioners acknowledge that any nonsubsidized United States steamship operator may lawfully engage in domestic service between the Pacific Coast and Hawaii without the "written permission" of the Board under Section 805(a) of the Merchant Marine Act, 1936,[5] and that it is *solely because* PFEL *is* a subsidized operator in the foreign trade that it must secure the "written permission" of the Board under Section 805(a) prior to engaging in a nonsubsidized domestic service between the Pacific Coast and Hawaii (Bd. 14; Mat. 6),

Petitioners, however, would have this Court believe that a "fundamental condition" attached to PFEL's

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[4] Matson's petition incorporates by reference the assertions of the Board in respect of the effect of the decision of the court below (Mat. 7).

[5] Section 805(a) of the Merchant Marine Act, 1936 is hereinafter referred to as "Section 805(a)."

subsidy contract with the Board for service in the foreign trade in that PFEL waived the right to engage in nonsubsidized service in the domestic trade (Bd. 9-11; Mat. 7-9). The fact is that PFEL's subsidy contract contains only the provision that PFEL will not engage in domestic service "without the permission of the United States granted pursuant to Section 805(a) . . ." (J.A. 548). This is the standard provision in any subsidy contract, and PFEL would be subject to Section 805(a) without this provision because it is a subsidized operator.

Petitioners would also have this Court believe that the basic issue before the Board, raised by PFEL's application for "written permission" under Section 805(a) to engage in nonsubsidized domestic service between the Pacific Coast and Hawaii, was the effect that PFEL's competition in nonsubsidized domestic service would have upon an exclusively domestic operator, namely, Matson (Bd. 8, 13, 24-25; Mat. 4, 13). The fact is that Matson is a subsidized operator in the foreign trade as is PFEL.

The only difference between PFEL and Matson in respect of their subsidy status is that PFEL is subsidized *qua* PFEL and that Matson has a wholly owned and directly managed subsidiary, Oceanic Steamship Company, which is a subsidized operator in the foreign trade (J.A. 9-10, 502-505, 542).[6] Even Matson's California-Hawaii operations are not exclusively a domes-

[6] The court below properly wasted no time in piercing the veil in respect of Matson's subsidy status. The court concluded that "we cannot accept the Board's view that Matson is 'fundamentally entitled' to retain this [Matson's] monopoly as against a competitor that is subsidized—as Matson itself is, through its subsidiary Oceanic—in a different trade" (Bd. 31; Mat. 18-19).

tic service since Oceanic's vessels not only operate in the California-Hawaii trade as part of their subsidized foreign voyage but do so with the Board's permission (J.A. 485-487, 579).

1. *The court below correctly held that the Board's determinations under Section 805(a) are subject to judicial review.* Petitioners assert that the Board's determinations under Section 805(a) are discretionary in nature and that therefore they are committed by law to agency discretion (Bd. 9-10; Mat. 7-9). Section 805(a) itself plainly refutes this assertion. If the Board finds that the grant of an application by a subsidized carrier to engage in the domestic service would not result in "unfair competition" to any carrier operating exclusively in such service and that the grant of such application would not be prejudicial to the "objects and policy" of the Merchant Marine Act, 1936, the Board has no discretion but to grant such application.

As the court below properly stated, the Merchant Marine Act, 1936 "does not preclude judicial review and does not commit the Board's action to the Board's discretion" (Bd. 30; Mat. 17). The Board's determinations under Section 805(a) do not therefore fall within the exceptions to rights of review provided by Section 10 of the Administrative Procedure Act.[7] See *Heikkila* v. *Barber*, 345 U.S. 229, 232-233 (1953); *Dismuke* v. *United States*, 297 U.S. 167 (1936).

The review afforded respondents by the court below of the Board's determination under Section 805(a) involved review of the application of statutory standards to the facts of a particular case, not review of a determination essentially discretionary by nature such as the

[7] Appendix, *infra*, p. 13.

award of a subsidy or loan. The Board's determination was based on a "hearing," which Section 805(a) required the Board to give PFEL and intervenor Matson. Here, as in *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177, 182-183 (1938), "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts' " and "The nature of the determination points to the propriety of judicial review." Any possible doubt that determinations such as those required by Section 805(a) are judicially reviewable was clearly resolved by this Court in *Stark* v. *Wickard*, 321 U.S. 288 (1944).[8] As the court below pointed out, "Nothing in the legislative history [of the Merchant Marine Act, 1936] indicates a contrary intention" (Bd. 30; Mat. 18).

Petitioners also assert that PFEL lacks standing to seek judicial review of the Board's denial of its application under Section 805(a) because PFEL is not "suffering legal wrong" or "adversely affected or aggrieved by such action within the meaning of any relevant statute . . ." as required by Section 10(a) of the Administrative Procedure Act (Bd. 10-11; Mat. 9).[9] The cases cited by petitioners in support of this assertion (Bd. 11; Mat. 9) are wholly inapposite in that, unlike the cases cited, Section 805(a) specifically gives applicants for "written permission" under this Section

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[8] Subsequently, this Court reaffirmed its holding in the *Stark* case. *Estep* v. *United States*, 327 U.S. 114 (1946); *Federal Reserve System* v. *Agnew*, 329 U.S. 441 (1947); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949); *Harmon* v. *Brucker*, 355 U.S. 579 (1958).

[9] Appendix, *infra*, p. 13.

the right to a hearing before the Board; and if an applicant meets the "unfair competition" and the "objects and policy" tests of this Section, the Board is required to give its "written permission." PFEL is clearly "adversely affected" by the Board's action and suffers "legal wrong" within the meaning of Section 10(a) of the Administrative Procedure Act when it is denied "written permission" to enter the domestic trade on the basis of the Board's misconstruction of the statutory standards for "written permission."[10]

2. *The court below correctly held that the Board denied PFEL's application on the basis of misconstruction of the standard of "unfair competition" contained in Section 805(a).* The Board, in reading its own meaning into the test of "unfair competition," has admittedly made this test solely "an adequacy of service test" (Bd. 18). The effect of the Board's test of "unfair competition" is that the competition of any applicant for "written permission" under Section 805(a) is automatically determined by the Board to be "unfair competition" if such competition is felt by a domestic operator that "needs" and "has the capacity" to carry available cargoes (J.A. 17). Clearly, "an adequacy of service test" is not the test of "unfair competition" notwithstanding the Board's studied effort to substitute its own meaning for this test of Section 805(a).

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[10] Matson, but not the Board, asserts that judicial review of this case should have been had, if at all, before a three-judge district court (Mat. 9-10). The fact that Matson did not seriously press this claim in the courts below is evident from Matson's disclosure to this Court that such claim was only "called to the attention" of the courts below (Mat. 10). In any event, this claim was properly rejected by the courts below for the reasons cogently stated by the United States (U.S. 8, Note 7).

It is abundantly clear from the legislative history of Section 805(a)[11] that the purpose of this Section was to prevent United States steamship operators who are subsidized in the foreign trade from using their subsidies to compete with nonsubsidized United States operators in the domestic trade. As the court below stated, "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade" (Bd. 30). Indeed, as the court below noted, Matson's witnesses in the proceeding before the Board "admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy" (Bd. 30-31).

The complete fallacy of the Board's test of "unfair competition" could not be more accurately stated than that, as the court below pointed out, "The Board practically equated unfair competition with effective competition" (Bd. 31).

3. *The court below correctly held that the Board failed to disclose any basis for enabling the court to determine the validity of the Board's finding that PFEL's entry into the domestic trade would be "prejudicial to the objects and policy" of the Merchant Marine Act, 1936.* The Board simply concluded that because it had found that PFEL's application for "written permission" under Section 805(a) would result in "unfair competition" to Matson the grant of this application would *a fortiori* "be prejudicial to the objects and policy" of the Act. The Board did not explain what objects or what policy of the Act would

[11] A concise outline of the legislative history of Section 805(a) is presented by the United States (U.S. 10-11).

be prejudiced, much less in what respects they would be prejudiced. As the court below stated, "'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654" (Bd. 32). The court below did not reverse the Board's finding in respect of the "objects and policy" of the Act, but remanded the case to the Board "so that it may reconsider this finding and clarify it if if is retained" (Bd. 32).

It is perfectly clear that the Board did not take into account in respect of the "objects and policy" of the Merchant Marine Act, 1936 the undisputed fact that Matson has a monopoly position to the extent of at least 98% of all cargoes moving by surface between the United States and Hawaii. The court below correctly stated that "the public interest in ending this monopoly should be considered" by the Board and the "Preservation of Matson's monopoly is not an object or policy of the Act" (Bd. 32). The far flung reach of Matson's monopoly of the trade and the economy of the State of Hawaii was even recognized by the Board (J.A. 8-9), which makes the more incredible the Board's failure to give it any weight in determining whether the grant of PFEL's application for "written permission" under Section 805(a) would serve the "objects and policy" of the Act.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions and there is no important question warranting review by this Court.

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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June 3, 1960

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, 49 Stat. 2012, 52 Stat. 963, 1950 Reorg. Plan No. 21, §§ 105(1), 204, 306, 15 F. R. 3178, 64 Stat. 1274-1276, 66 Stat. 765, 46 U. S. C. § 1223(a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171-1182 of this title, or to charter any vessel to any person under sections 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor, or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided*, That if such contractor or other person above described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such opera-

tion, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, provides in portions here material as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHTS OF REVIEW

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

FORM AND VENUE OF PROCEEDINGS

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

ACTS REVIEWABLE

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *